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SUPREME COURT OF THE UNITED STATES

October Term, 1997

Terry Stewart, Director,
Arizona Department of Corrections, et al.,
Petitioners,
vs.
Ramón Martínez-Villareal,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE UNITED MEXICAN STATES; MIGUEL ANGEL GONZALEZ, Legal Advisor of the Secretary of Foreign Relations of Mexico; LUIS CABRERA, Consul General of Mexico in the State of Arizona IN SUPPORT OF THE RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Respondent Ramón Martínez Villareal is a Mexican national, and Mexico, as does every sovereign nation, seeks to protect the rights of its citizens abroad. Mexico does not use capital punishment and opposes its imposition on its citizens by other countries. The propriety of the death penalty, however, is not the focus of this brief. Fundamental fairness is, and the Government of Mexico is deeply concerned that it is being denied to Mr. Martínez.[1]

SUMMARY OF ARGUMENT

Mindful both of Rule 37.1's admonition against needless repetition and of the respect that one sovereign owes another, Mexico does not intend to tell the Supreme Court of the United States how it should answer the more complex questions of statutory construction raised by the parties. Instead, Mexico contrasts the American justice system's treatment of Mr. Martínez (and Mexico) with that accorded the Petitioners. Mr. Martínez ultimately may be executed because of his counsel's failure to comply with the technicalities of American law. This is so fundamentally unfair that Mexico filed its own lawsuit to stop it, but was rebuffed, again because of technicalities. In contrast, Petitioners not only successfully took flatly contradictory positions in the federal district court, but they also succeeded

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[1] This brief has not been authored in whole or in part by counsel for a party, nor has any person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. As required by Supreme Court Rule 37.3(a), Mexico has obtained the written consent of all parties to file this *amicus curiae* brief.

in submitting a petition whose filing is prohibited by the very statute that is the subject of the petition.

This unfairness of treatment is compounded by the inequity of Petitioners' position on the merits. Petitioners' construction of the Antiterrorism and Effective Death Penalty Act ("AEDPA") is contrary to fundamental principles of international law including those imposed by the American Declaration of the Rights and Duties of Man (hereafter the "American Declaration") which is binding upon the United States. The American Declaration requires that every person be given meaningful access to the courts to protect against violations of fundamental constitutional rights. In *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court recognized the fundamental constitutional right not to be executed while insane and that a federal forum exists to protect that right. The construction of the AEDPA sought by Petitioners and their *amici* means a *Ford* claim is always too early or too late for federal review. Such a perverse result is outrageous and contravenes the United States' obligations under the American Declaration.

ARGUMENT

Mr. Martínez Has Been Treated Unfairly

Mexico greatly admires the American justice system, which is held up to the rest of the world as a model of due process, and rightly so. That is one reason why Mexico finds the failure of that system in this case so disturbing.

Only one court has ever considered the merits of Mr. Martínez' claims that his death sentence was unconstitutional because his trial counsel was incompetent. That court agreed:

> [T]he Court finds that trial counsel's performance was constitutionally defective at

> this critical stage of the proceedings rendering the result of the sentencing hearing unreliable and most likely, unfair.

Martinez-Villareal v. Lewis, No. CIV-88-296-TUC-RMB (D. Ariz. Oct. 20, 1994) (Appendix A at 3 (opinion excerpts)).

> At sentencing, [trial counsel] Rothstein essentially abandoned his role as Martinez-Villareal's advocate. The errors and omissions of Rothstein contributed to Martinez-Villareal receiving a death sentence.... [T]he Court is convinced that there is a reasonable probability that, but for Rothstein's errors and omissions, the result of the sentencing outcome would have been different.

Id. at A-14. The Ninth Circuit Court of Appeals reversed on procedural bar grounds, holding that the district court was bound by the state court findings that the ineffective assistance of counsel claim was procedurally defaulted because that same lawyer failed to raise his own incompetence in the first state post-conviction proceeding. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir.), *cert. denied sub nom. Martinez-Villareal v. Stewart*, 117 S. Ct. 588 (1996).

Three other judges have expressed their views that executing Mr. Martínez under these circumstances would be unfair. The judge who sentenced him to death testified at Mr. Martínez' clemency hearing that Mr. Martínez should not be executed. That same day two justices of the Arizona Supreme Court made the unprecedented request that the Board of Executive Clemency recommend to the Governor that Mr. Martínez' death sentence be commuted to life in prison:

[T]he evidence makes it clear that Defendant is mildly retarded and seriously mentally ill. He may well have been in that condition at the time of the crime. At the mitigation hearing, his lawyer did not present evidence of his mental condition or problems. In subsequent federal habeas corpus proceedings, the district judge concluded that the failure to present such evidence was ineffective assistance of counsel. This finding was reversed by the Ninth Circuit Court of Appeals, not because it was erroneous, but, the court said, because the issue was precluded because the same lawyer who performed ineffectively failed to raise his own lack of effective representation as a ground for relief.

In short, this is a case that raises serious doubts about the propriety of the death sentence. For that reason, we commend this matter to review by the Board of Executive Clemency and to commutation by the Governor to imprisonment for life, consecutive to all other terms imposed.

Appendix B attached.

The Mexican Government was so appalled that Mr. Martínez could nevertheless be executed under these circumstances and without having been afforded the protection of minimally competent trial counsel that it filed its own lawsuit seeking to stop the execution. That suit asserted violations of international law prohibiting the execution of the mentally retarded and of persons who were denied the assistance of competent counsel as Mr. Martínez undeniably was. The suit, which also asserted violations of

the United States' obligations under the Vienna Convention, was summarily dismissed by the federal district court – not on the merits -- but on sovereign immunity grounds.

On appeal, although a stay of execution was already in place and despite the magnitude of the issues involved, the Ninth Circuit Court of Appeals ordered expedited briefing (11 days), denied oral argument, denied Mexico the opportunity to file a reply brief and limited the briefs to 15 pages. Six days later and without extending the briefing schedule or deadlines, the court asked the parties to address three additional justiciability questions. Four months later, the court affirmed the district court and held that a suit seeking an injunction against a future act – Mr. Martínez' execution – was barred because Mexico was not seeking prospective relief. *United Mexican States v. Woods*, 126 F.3d 1220, 1223 (9th Cir. 1997).

Mexico is not challenging that decision in this brief. We nevertheless mention it here for two reasons. First, it is a further example of the technicalities that are being asserted to allow Arizona to execute a retarded man who is on death row only because of the incompetence of his counsel. Second, it stands in marked contrast to the treatment accorded the State.

When Mr. Martínez filed his first habeas corpus petition, his new lawyers raised the issue of his competency to be executed. The State successfully argued that the claim was premature. Both the federal district court and the Ninth Circuit Court of Appeals indicated that the claim could be pursued when and if an execution was imminent. Upon his next appearance in federal court, the State said it was now too late to raise this claim and was again successful. This kind of legerdemain was too much for the Ninth Circuit and that court properly rejected the absurdity that a *Ford* claim is

always too early or too late for federal review. *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997).

That should have been the end of the matter. The very statute upon which the State relies prohibits review of the Ninth Circuit's decision by way of a writ of certiorari. 28 U.S.C. § 2244(b)(3)(E). Yet, certiorari was granted.

Mexico is hard pressed to understand the technicalities that may send Mr. Martínez to his death. It is even harder to understand why the procedural rules do not apply to the Petitioners' attempts to reverse the one narrow, albeit very important, decision in Mr. Martínez' favor.

Petitioners' Interpretation Of The AEDPA Violates International Law And Basic Principles Of Equity And Fairness

Reversing the Ninth Circuit's decision would violate fundamental principles of international law. Article XVIII of the American Declaration requires meaningful access to the courts:

> Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

OAS Res. XXX, O.A.S. Rec. OEA/Ser.L/V/I.4 (1945), as revised (1965). The Organization of American States approved the Declaration at the Ninth International Conference of American States in Bogata, Colombia in 1948. The United States is bound by the Declaration by virtue of its

1968 ratification of the OAS Charter as amended by the 1967 Protocol of Buenos Aires.

Executing the insane violates fundamental constitutional rights and "simply offends humanity." *Ford*, 477 U.S. at 409-10. In *Ford*, this Court held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.* As the Court noted, the "bar against executing a prisoner who has lost his sanity bears impressive historical credentials; the practice consistently has been branded 'savage and inhuman.'" *Id.* at 406. The Court then acknowledged the continued vitality of this "ancient and humane limitation." *Id.* at 409:

> [T]he natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today.... Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

Id. at 409-10. This Court then held that Ford was entitled to an evidentiary hearing in federal district court on the question of his competence to be executed. *Id.* at 418.

Ford established that the right not to be executed while insane is a fundamental constitutional protection and proved the need for a federal forum to protect this right. Petitioners' construction of the AEDPA would eliminate that federal forum and eviscerate the ancient substantive right *Ford* recognized. In addition to being grossly inequitable in light of Petitioners' initial position that this claim was

premature, such a construction contravenes the United States' obligations under the American Declaration.

The possibility of a state court competency proceeding does not cure the violation. Under Petitioners' and their *amicis'* construction of the AEDPA, even the complete absence of a competency hearing is beyond review. Thus, there would be no way for the United States to ensure the protection of the fundamental constitutional right not to be executed while insane. The American Declaration forbids such a result.

Reversing the Ninth Circuit's decision would be more disappointing, more appalling, and more outrageous than any of the previous rulings against Mr. Martínez. The constitutionality of the procedural default rules that would allow the execution of a man represented by an incompetent lawyer is premised on the notion that Mr. Martínez at least had one chance (had he perfected his claim) to present his ineffective assistance claim in federal court. Here, by contrast, Mr. Martínez did everything he could to present in federal court his claim of incompetency to be executed. Nevertheless, although executing the insane unquestionably violates the Eighth Amendment and "offends humanity," Petitioners' unduly rigid interpretation of the AEDPA would deprive Mr. Martínez of any chance to obtain federal review and thus protect this constitutional right.

The notion that a *Ford* claim is always too early or too late for federal review is repugnant to fundamental notions of fairness shared by the society of civilized nations and reflected in both the American Declaration and the United States Constitution. It besmirches the system of justice that Mexico and the rest of the world community so greatly admire. Mexico cannot accept such a position and respectfully asks that this Court reject it.

CONCLUSION

The decision of the Ninth Circuit accordingly should be affirmed.

January 1998.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL,	)	No. CIV 86-296 TUC RMB
Petitioner,	)	
vs.	)	**ORDER AND MEMORANDUM OPINION**
SAMUEL A. LEWIS, et al.,	)	
Respondents.	)	

...

B. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
(Claims 4.1, 4.2, 4.3 and 4.4)

William Rothstein represented Martinez-Villareal at his arraignment, pretrial proceedings, trial, sentencing, direct appeal to the Arizona Supreme Court, petition for writ of certiorari to the United States Supreme Court, Petitioner's first Rule 32 petition, petition for rehearing, and petition for writ of habeas corpus in United States District Court in addition to seeking stays of execution in various state and federal proceedings. Petitioner was subsequently represented by Carla Ryan, Luis Castillo and Daniel Davis, John Hannah and present counsel, Sean Bruner. Martinez-Villareal now asserts that he was denied effective assistance at all stages of the litigation.

The State contends that these claims are procedurally defaulted or have no constitutional basis as a matter of law.

. . .

1. Ineffective Assistance of Trial Counsel

The inquiry first turns to the issue of the alleged ineffectiveness of William Rothstein. Martinez-Villareal's present counsel asserts that Rothstein's representation was defective at the guilt-innocence phase of the trial (Claim 4.1); the sentencing phase of the trial (Claim 4.2); and the appeal phase (Claim 4.3).

. . .

b. Penalty Phase (Claim 4.2)

Martinez-Villareal contends that Rothstein's representation at sentencing was constitutionally defective and but for that representation, he would not have been given a sentence of death. A capital sentencing proceeding is sufficiently adversarial so that like a trial, counsel's conduct must be reasonably effective in order that the sentence imposed produce a just result. *Strickland*, 466 U.S. at 686-87, 104 S.Ct. 15 2064. Incompetent counsel's failure to present significant mitigating evidence creates a one-sided, non-adversarial sentencing hearing which in turn erodes confidence in the outcome of the case. *See* Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan. L. Rev. 461, 485 (1984). The reviewing court must not use the benefit of hindsight to challenge what might have been under the circumstances "sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. The reviewing court must also apply a strong presumption that counsel's behavior fell within

the wide range of reasonable conduct. *Id.* In determining whether defense counsel engaged in a thorough investigation, courts should look to whether counsel investigated the defendant's background, education, employment record, mental and emotional stability, family relationships and religious beliefs. *See, e.g.*, Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 323-25 (1983) (discussing investigations appropriate to presenting a prima facie trial for life). With those standards in mind, the Court finds that trial counsel's performance was constitutionally defective at this critical stage of the proceedings rendering the result of the sentencing hearing unreliable and most likely, unfair. *See, Lockhart v. Fretwell*, ____ U.S. ____, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993).

The first evidence of ineffective representation begins with the Presentence Report. On May 5, 1983, Rothstein wrote the probation officer a one-page letter in order that counsel's recommendations could be included in the Presentence Report. The letter states in relevant part:

> We know two people are dead, but we really do not know what actually happened at the Salero Ranch on that date. These people cannot be brought back and obviously, under the statute Ramon must be punished and it will be punishment, pure and simple.
>
> I would recommend to your office and will recommend to the Court on May 20, 1983, that Ramon be given the maximum sentence for the Aycock burglary, the maximum sentence for the Bailey Burglary, life imprisonment without the possibility of parole for twenty-five (25)

years, on each murder count and that they all run concurrently.

Ramon is 38 years old, if you add 25 years on to this, he will be 63 years old when he gets out and his life will, in fact, be over.

Petitioner's Amended Petition, Exhibit 4. This letter is wholly inadequate as it does not present any mitigating circumstances. Instead, through a single sentence Rothstein attempts to plead for mercy by pointing out that Petitioner will lose 25 years of his freedom if he is given a life sentence. There is nothing in Rothstein's letter to "humanize" the defendant, no discussion of his past family life, no showing of cultural deprivation or lack of mental capacity.

Additionally, Rothstein did not prepare Martinez-Villareal for the presentence interview and did not accompany his client to interview. Based on Rothstein's devastating experience with the suppression hearing and Petitioner's confusion between the jurors and the audience, this failure constituted egregious conduct. Fluent in spanish, Rothstein's presence would have ensured that the information given by the Defendant through an interpreter was accurate and presented his client in the best light. It is not surprising that the probation officer found no mitigating circumstances and recommended the death penalty. While Rothstein's conduct might initially be characterized as trial strategy, these facts provide evidence that leaving Martinez-Villareal to face the probation officer alone was certainly not sound legal practice.

Trial counsel's only witness at the mitigation/sentencing hearing was the probation officer. Rothstein's examination was limited to trying to get the

probation officer to agree that petitioner's trial defenses relating to duress constituted mitigation. There was no attack, for instance, on the prejudicial statements made by Lt. Bracamonte found in the Report. This also cannot be dismissed as permissible trial strategy, when the sentencing hearing is viewed in its totality.

Other significant factors of deficient conduct are apparent. Rothstein did not offer evidence respecting Martinez-Villareal's good behavior while awaiting trial. *See, e.g., Skipper v. South Carolina*, 476 U.S. 1, 8, 106 S.Ct. 1669, 1672-73, 90 L.Ed.2d 1 (1986). Rothstein was also ineffective by not anticipating that the sentencing court would find the obvious aggravating factor of "pecuniary gain." The victims' truck was driven from the scene and found in the desert with Martinez-Villareal's fingerprints on the wheel.

Arizona is a mandatory death penalty state. That is, if there is any one aggravating factor found under A.R.S. § 13-703(F), then death is mandatory unless the mitigating factors outweigh the aggravating factors. Trial counsel raised no mitigating factors, other than arguing a plea for mercy and re-arguing the right to a second degree murder instruction, an instruction which had been previously rejected by the judge. By not presenting obvious mitigating factors, the sentencing court was left with no choice but to sentence Martinez-Villareal to death.

Rothstein did not offer mitigating evidence because he failed to investigate possible sources of such evidence. Evidence presented at Martinez-Villareal's habeas hearing and available at the time of sentencing indicates that if Rothstein had investigated Martinez-Villareal's family and psychological background, he could have presented

numerous character witnesses along with a history of psychological disturbance.

Specifically, Rothstein never presented any mitigating evidence regarding Martinez-Villareal's cultural deprivation and primitive upbringing in an impoverished, isolated rural area of Mexico.[1] Present counsel presents the affidavits of Guadalupe Martinez-Villareal and Isidro Martinez-Villareal, Petitioner's sister and brother. This affidavit establishes that Rothstein never contacted them and yet, present counsel was able to do so almost eleven years later. *See*, Supplement to Amended Petition, December 27, 1993. Thus, the family was denied the opportunity to be present and to testify on their brother' s behalf. Rothstein's decision to forego this investigation and avail himself of this helpful testimony was not reasonable.

Additionally, Petitioner's family members could have testified as to his history of mental problems. Dr. Geffen was able to discern that: (1) Martinez-Villareal was not allowed to go to school because he was mentally ill; (2) Petitioner's father did not believe in mental treatment, but his uncle took him to a psychologist in Chihuahua, Mexico who told the family that Martinez-Villareal was mentally ill; and (3) Petitioner has had auditory and visual hallucinations since his youth.

The sentencing hearing was trial counsel's opportunity to show that Martinez-Villareal was worth saving as a human being through the testimony of family members who loved

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[1] The Court notes that the presentence report contains some information on Petitioner's family background and lack of education. This does not substitute for an attorneys' duty to advocate for his client.

him. *See, e.g., Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992), *cert. denied*, ____U.S. ___, 113 S.Ct. 1363 (1993). The sentencer must not be precluded from giving individualized consideration to any relevant mitigation aspect of the defendant's character or record. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978). The sentencer, however, can only evaluate this information if the defendant presents it. Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan. L. Rev. 461, 485 (1984). The Court finds that there is a reasonable probability that had the sentencing judge had the benefit of this testimony, Martinez-Villareal would have been given a life sentence.

The most glaring and prejudicial error concerns Rothstein's failure to have Martinez-Villareal's mental health investigated. Arizona recognizes mental incapacity is a mitigating factor when:

> [t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired to constitute a defense to prosecution.

A.R.S. § 13-703(G)(1). Rothstein testified at the habeas hearing that he was familiar with the procedure for obtaining a mental health evaluation, R.T. of June 23, 1994 at 20, but did not know that it could be used as part of a defense strategy. *Id.* at 2. Rothstein testified that throughout the years of his representation, Martinez-Villareal exhibited symptoms of mental illness and did not appear to comprehend what was going on. For example, Martinez-Villareal was fixated on getting his boots back which had been confiscated by police. Corroborating this fact is Lt.

Bracamonte's statements in the Presentence Report and Petitioner's statement at sentencing. Indeed, according to Rothstein, immediately after receiving a sentence of death Martinez-Villareal asked him, "Well, do I get my boots back?" R.T. of June 23, 1994 at 6. Rothstein testified, "After he was sentenced to death, he asked about his boots. I remember that. I'll never forget that as long as I live." *Id.* at 19.[2]

Rothstein also testified, "I do remember something about voices or him seeing somebody that wasn't there, but I don't remember exactly what i[t] was, you know, maybe a family member or somebody, something with voices, but I don't recall specifically what it was." *Id.* at 18. Yet, Rothstein did not seek to have his client evaluated.

Dr. Garcia-Buñuel testified at the habeas hearing as to his conclusions regarding Martinez-Villareal's mental health. Dr. Garcia-Buñuel is the Director of Correctional Psychiatry for the Maricopa County Sheriff's Office through the Maricopa County Health Department. He has had twenty-one years of dealing with psychiatric issues involving inmates. He has done over a thousand competency examinations similar to the one requested of him in this case. Additionally, Dr. Garcia-Buñuel is a Spaniard who was able to conduct his examination of the Petitioner without the need of an interpreter.

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[2] There was also testimony that within a few hours of execution, Martinez-Villareal was more concerned with getting a broken television repaired than he was of his own imminent death. As this event occurred subsequent to the sentencing hearing, it was not considered in reaching today's decision.

From his evaluation of Petitioner, Dr. Garcia-Buñuel discerned the following: Martinez-Villareal was born in an "ejido" in the State of Chihuahua and grew up as a peasant. He was told that he was "loco" by his parents, because he would get mad and hit his head against rocks and walls. Corroborating this fact are the visible scars on his forehead both below and above the hairline.

Dr. Garcia-Buñuel also discovered that Petitioner has heard voices since he was a "chiquito." Petitioner was hospitalized in Chihuahua for about a year where according to Petitioner, an older psychiatrist prescribed medication to get rid of the voices but that it was not effective.

Petitioner has tried to kill himself by slicing his left forearm. Dr. Garcia-Buñuel observed three longitudinal scars in Petitioner's left forearm and opines that people who make faint suicide attempts, slice their veins at the wrist. Longitudinal "slicing" along the veins/arteries as found on Petitioner's arm are serious, lethal suicide attempts.

It is Dr. Garcia-Buñuel's professional opinion that Martinez-Villareal suffers from paranoid schizophrenia and has suffered from this malady since adolescence. Thus, Dr. Garcia-Buñuel concludes that it is reasonable to assume that at the time of the murders, trial and sentencing, Martinez-Villareal was suffering from this illness. What is significant about Dr. Garcia-Buñuel's findings is that with reasonable investigation and a subsequent psychological evaluation, the above information would have also been available to Rothstein to present at the mitigation hearing.

The State's medical experts at the habeas hearing disagreed with Dr. Garcia-Buñuel's conclusions. Instead, they found Petitioner to be malingering and presently

mentally competent. Drs. Gopalan and Brim reach this conclusion based on their impressions of Martinez-Villareal from their contact with him during the course of treatment, from a review of Petitioner's mental health records and from conversations with other DOC personnel.

Dr. Gopalan, a consulting psychiatrist with the DOC, has treated Martinez-Villareal longer than any other DOC doctor. Dr. Gopalan testified that it is his professional opinion that despite showing psychotic symptoms for the past six years, Martinez-Villareal is not schizophrenic. Instead, Dr. Gopalan characterized Martinez-Villareal's aberrant behavior as "culturally-deprived, sensorial-deprived presentations." R.T. June 23, 1994 at 30. In response to whether Petitioner's demeanor at the habeas hearing was evidence of a catatonic type of schizophrenia, Dr. Gopalan stated:

> "it doesn't rule it in or rule it out. I mean, he's just sitting there with his eyes closed with very little affect shown, which should be consistent with a schizophrenic and a catatonic schizophrenic but would also be consistent with several other conditions, too.
>
> * * *
>
> He can be very depressed, not interested in what's going on. He could be not understanding what is going on, or he could be feigning.

Id. at 36. Dr. Gopalan conceded that Martinez-Villareal's lack of sophistication casts "some doubt" on a diagnosis of malingering. *Id.*

Petitioner's medical records reflect that Dr. Gopalan first saw Martinez-Villareal July 24, 1986 when Petitioner reported hearing voices. Exhibit 2B at 247. Dr. Gopalan was not sure whether Petitioner was experiencing auditory hallucinations and wrote in the file "beginning stages of schizophrenic form disorder." *Id.* Martinez-Villareal was prescribed Navane and Artane and stated that he felt better and heard no voices. R.T. June 23, 1994 at 50. Artane is given to control the side effects of the Navane and has no bearing on whether a person hears voices. *Id.* Dr. Gopalan testified that he believed Martinez-Villareal wanted Artane either for its euphoric effect or to give to other inmates and not for the control of any hallucinations.

Dr. Gopalan's diagnosis of malingering is based, in part, on an April, 1990 blood test that showed Martinez-Villareal was not taking the Navane. However, the medical records reflect that on May 14 and 15, 1990, Martinez-Villareal was refusing both the Navane and the Artane. On June 26, 1990, the medical records reflect:

> [Martinez-Villareal] was complaining of auditory and visual hallucinations, hears his name called and sees snakes, has thoughts of cutting himself, verbal contact obtained to not harm himself. . .

Exhibit 2B at 300. At the time, Dr. Gopalan questioned whether this "decompensation" was manipulative because Martinez-Villareal had not been taking his Navane with no complaints. Nonetheless, Dr. Gopalan prescribed Navane but with Cogentin, a drug which does not provide the euphoric effect found in Artane. Subsequent periodic blood tests established that Martinez-Villareal was taking his medication since the Navane levels in his blood were within a therapeutic

range. This course of treatment continued until Martinez-Villareal complained that he felt the medication was no longer effective. He was then prescribed Prolixin-D which is an antipsychotic drug administered intravenously. Dr. Brim discontinued Prolixin-D in November, 1993, based on his opinion that the treatment was of no benefit to Martinez-Villareal. Exhibit 2B at 358. At that same time, the medical records reflect that Dr. Brim characterized Petitioner's behavior as "factitious mental disorder." *Id.* At the habeas hearing, however, Dr. Brim characterized that that diagnosis as a "slip of the pen." R.T. June 23, 1994 at 203. Dr. Brim testified that he should have written "malingering" rather than "factitious mental disorder." *Id.*

While the State's experts and medical records raise questions of whether Martinez-Villareal is feigning his present mental state, it is not conclusive either way as to whether Martinez-Villareal was incompetent at sentencing. His medical records do establish that the treating DOC psychiatrists felt at one time that it was medically appropriate to prescribe Martinez-Villareal antipsychotic drugs.

The Court is well aware that Petitioner's statements to Dr. Garcia-Buñuel could be considered self-serving under normal conditions. It was Dr. Garcia-Buñuel's professional opinion, however, that Martinez-Villareal was being truthful and was not feigning his mental state. According to Dr. Garcia-Buñuel a diagnosis of schizophrenia does not mean that Martinez-Villareal was unaware of the significance of the murders. As discussed previously, that retroactive determination cannot be made. Dr. Garcia-Buñuel was a credible witness with his testimony and conclusions persuasive. Thus, it is this Court's finding that Dr. Garcia-Buñuel's testimony undermines the reliability and fairness of Martinez-Villareal's mitigation hearing. The proper course of

conduct at sentencing should have been to have all of this information available for the sentencing court's consideration.

Of course, it is acceptable trial strategy to choose not to call psychiatrists at sentencing where the experts would be subjected to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion. *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990). In this case, however, Rothstein made *no* inquiry into Martinez-Villareal's sanity and thus, no tactical evaluation occurred. No risk would have been incurred by presenting evidence of Petitioner's mental capacity. There is no evidence that Rothstein committed these acts as part of a scheme to build in constitutional error. Instead, trial counsel's failure to investigate was a mistake, not a strategic decision. *See* Ronnie Seidel, *Criminal Procedure--Right to Effective Assistance of Counsel at Capital Sentencing -- Frey v. Fulcomer*, 974 F.2d 348 (3d Cir. 1992, *cert. denied*, 113 S.Ct. 1368 (1993), 66 Temp. L. Rev. 1107 (1993). Thus, absent tactical purpose or risk, failure to investigate the defendant's mental state and request a Rule 11 evaluation was ineffective assistance of counsel within the meaning of *Strickland*. *Mak v. Blodgett*, 970 F.2d at 619.

Rothstein admitted at the habeas hearing that if he had presented evidence of Martinez-Villareal's mental problems, it would have made a difference:

> . . . I messed up. I mean I did, you know, and I feel bad about it, and I have for all these years. Because if I had done that and presented -- done more at the sentencing, then I think maybe he would have given him -- he would have probably given him consecutive

terms but he wouldn't have given him the death penalty. That's just my opinion. That's all.

Id. at 11.

At sentencing, Rothstein essentially abandoned his role as Martinez-Villareal's advocate. The errors and omissions of Rothstein contributed to Martinez-Villareal receiving a death sentence. Taking into consideration any evidence the State might have conceivably produced in rebuttal, the Court is convinced that there is a reasonable probability that, but for Rothstein's errors and omissions, the result of the sentencing outcome would have been different. *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988); *Strickland v. Washington*, 104 S.Ct. at 2068. Martinez-Villareal has met both prongs of the *Strickland* test. The Court concludes that the writ must be granted insofar as the penalty phase of death is concerned.3

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[3] Had Rothstein stepped aside and allowed new counsel to assert this challenge at the first state post-conviction proceeding, Martinez-Villareal might have received a new sentencing hearing eight years ago. In capital cases, allowing the trial attorney to represent the defendant at all stages of the litigation especially where mental capacity is in doubt frustrates the legal process and hinders justice.

APPENDIX B

IN THE SUPREME COURT

STATE OF ARIZONA

RAMON MARTINEZ-VILLAREAL,	)	
	)	No. CV 97-0206-SA
Petitioner,	)	
	)	
vs.	)	PINAL County Superior Court
PINAL COUNTY SUPERIOR COURT, HONORALBE BOYD T. JOHNSON, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Pinal,	)	No. CR 970-22291
	)	ORDER
Respondents.	)	
STATE OF ARIZONA,	)	
Real Party in Interest.	)	

Petitioner has filed a request for special action relief from the Order of the Superior Court dated May 9, 1997 on the matter of the Petitioner's competency to be executed pursuant to the conviction and death sentence heretofore imposed upon him. The petition has been addressed by the full court.

Having considered the briefs filed on behalf of the Petitioner and the office of the Attorney General, the

arguments and authorities cited therein, the full transcript of the Superior Court proceedings to determine competency held April 7, May 6, May 7, and May 8, 1997, and having independently reviewed the testimony and medical evidence introduced at the hearing, and in light of the findings of the trial court, this court concludes that the trial judge correctly found that Petitioner failed to prove incompetency by clear and convincing evidence or even by the lesser standard requiring proof by a preponderance of the evidence.

IT IS THEREFORE ORDERED accepting jurisdiction of the special action petition herein.

IT IS FURTHER ORDERED denying the relief requested by Petitioner.

IT IS FURTHER ORDERED denying Petitioner's request for stay of execution.

DATED this 16th day of May, 1997.

/s/
CHARLES E. JONES
Vice Chief Justice

Separate statement by Chief Justice Zlaket and Justice Feldman:

We join in the Court's order accepting jurisdiction and denying relief. Defendant has not carried the difficult burden of proving by clear and convincing evidence that he is incompetent to be executed. The definition of incompetence for that purpose is quite narrow. However, the evidence

makes it clear that Defendant is mildly retarded and seriously mentally ill. He may well have been in that condition at the time of the crime. At the mitigation hearing, his lawyer did not present evidence of his mental condition or problems. In subsequent federal habeas corpus proceedings, the district judge concluded that the failure to present such evidence was ineffective assistance of counsel. This finding was reversed by the Ninth Circuit Court of Appeals, not because it was erroneous but, the court said, because the issue was precluded because the same lawyer who performed ineffectively failed to raise his own lack of effective representation as a ground for relief.

In short, this is a case that raises serious doubts about the propriety of the death sentence. For that reason, we commend this matter to review by the Board of Executive Clemency and to commutation by the Governor to imprisonment for life, consecutive to all other terms imposed. We suggest also that the Board and the Governor consider the comments of the district judge who presided at the federal habeas corpus proceedings. A copy of his May 16, 1997 order is attached.

/s/
THOMAS A. ZLAKET, Chief Justice

/s/
STANLEY G. FELDMAN, Justice